UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

STEPHEN A. SACCOCCIA

v. C.A. No. 97-248-T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER
DENYING MOTION FOR RECUSAL

Stephen Saccoccia has filed a § 2255 motion to vacate or correct his sentence. Pursuant to 28 U.S.C. § 455, he, now, moves to disqualify or recuse this Court from ruling on that motion. For reasons hereinafter stated, the recusal motion is denied.

Background

On May 12, 1993, Stephen Saccoccia was sentenced to a total of 660 years in prison after being convicted on multiple counts of RICO conspiracy (18 U.S.C. § 1962(d)), money laundering (18 U.S.C. § 1956(a)(2)) and related offenses arising out of a conspiracy to launder more than $130 million in proceeds from illegal drug trafficking activities. The conviction and sentence were affirmed by the Court of Appeals. See United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995).

Saccoccia's § 2255 motion appears to rehash many of the arguments previously made to and rejected by the Court of Appeals. It also includes additional arguments not raised on direct appeal. The only argument relevant to the instant recusal motion is the argument that Saccoccia was deprived of his Sixth Amendment right

to effective assistance of counsel due to what he alleges was a previously undisclosed conflict of interest on the part of his lead trial attorney, Jack Hill.

Saccoccia advances two reasons for contending that § 455 requires this Court to disqualify itself from ruling on his § 2255 motion. First, he claims that this Court's participation would create an appearance of partiality because, in effect, the Court would be placed in the position of reviewing the correctness of its previous decision to accept Saccoccia's waiver of his right to conflict-free counsel. In addition, Saccoccia asserts that this Court has "personal knowledge of disputed evidentiary facts" concerning his § 2255 motion. See 28 U.S.C. § 455(b)(1).

Discussion

28 U.S.C. § 455

A judge has an obligation to recuse himself or herself when there is a good reason for doing so. Conversely, a judge has a duty to hear the cases assigned to him or her; and, therefore, has a corresponding obligation not to recuse in the absence of a good reason. See United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992) (quoting Hinman v. Rogers, 831 F.2d 937, 938 (10th Cir. 1987)). Thus, a Court should not allow a litigant or a lawyer to pick and choose who will hear a case by vetoing the assignment of that case to a particular judge. See In re United States, 158 F.3d 26, 30 (1st Cir. 1998).

Section 455 describes a number of circumstances under which recusal is mandated. However, the movant must establish a "factual basis" for asserting that § 455 applies. See United States v. Lopez, 944 F.2d 33, 37 (1st Cir. 1991) (quoting United States v. Giorgi, 840 F.2d 1022, 1036 (1st Cir. 1988)). The statute "require[s] more than subjective fears, unsupported accusations, or unfounded surmise." In re United States, 158 F.3d at 30.

Unlike 28 U.S.C. § 144, which provides for recusal in the event of actual bias or prejudice, § 455 does not require either an affidavit attesting to the relevant facts or a certification from counsel that the recusal motion is made in good faith. Because those safeguards are lacking, § 455 does not require the judge "to accept as true the allegations made by the party seeking recusal." In re Martinez-Catala, 129 F.3d 213, 220 (1st Cir. 1997). Rather, the Court may make the necessary factual determinations and may decide whether the facts are sufficient to require disqualification. See id.; United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985) (Under § 455, "the judge is free to make credibility determinations, assign to the evidence what he believes to be its proper weight, and to contradict the evidence with facts drawn from his own personal knowledge.").

§ 455(a) - Appearance of Partiality

Section 455(a) mandates disqualification when a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

It is directed at the appearance of bias and does not require a showing of actual bias that must be established for recusal under § 144. The purpose of § 455(a) is "to promote public confidence in the impartiality of the judicial process." United States v. Boyd, No. 89 CR 908, 1995 WL 656691, at *2 (N.D. Ill. Nov. 6, 1995) (citing Balistrieri, 779 F.2d at 1204).

The test for determining whether recusal is appropriate under § 455(a) is an objective one. It is "whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the [movant], but rather in the mind of the reasonable man." Lopez, 944 F.2d at 37 (quoting United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976)).

Saccoccia contends that, since this Court previously accepted his waiver of conflict-free counsel, consideration of his § 2255 motion would create an appearance of bias because it would place the Court "in the position of reviewing the correctness of [its] own prior determination of facts based on inadequate evidence." (Mem. Supp. Mot. Recusal at 11.) However, the conflict of interest claim contained in Saccoccia's § 2255 motion does not require this Court to review its previous decision to accept Saccoccia's waiver. That decision already has been reviewed and affirmed by the Court of Appeals. See Saccoccia, 58 F.3d at 771-73. The issue now

before the Court is not whether its previous ruling was erroneous. Rather, it is whether there is evidence of previously undisclosed facts regarding Hill's conflict of interest that warrants invalidating Saccoccia's waiver of that conflict.

At the time of the waiver, Hill's conflict was described as arising from the prospect that he faced continuing prosecution in Austria for alleged currency or banking law violations and the fact that he was under investigation by United States authorities for matters that the government represented as being unrelated to Saccoccia's money laundering activities. The government further represented that it did not have sufficient information to determine the likelihood that Hill would be charged.

Although it appears that Hill was not subsequently prosecuted or charged by either government, Saccoccia asserts that the government's representations were false. He alleges that the United States actively was considering bringing charges against Hill and extraditing him, presumably when he was in Austria. Saccoccia implies that, if he had been aware of that, he would not have executed and the Court would not have accepted the waiver of his right to conflict-free counsel.

Saccoccia fails to explain how a determination by this Court regarding the validity of his waiver in light of the "newly discovered" evidence allegedly withheld by the government would create an appearance of partiality. Indeed such a determination is

no different from those that trial judges routinely make in ruling on motions for new trials based upon claims of newly discovered evidence. Moreover, § 2255 and its implementing rules expressly provide that the trial judge, as the one most familiar with a case, should "determine the issues and make findings of fact and conclusions of law" with respect to matters raised by § 2255 motions even though, unlike here, such motions often require reviewing the correctness of the trial judge's own rulings. 28 U.S.C. § 2255; see also Rule 4 of the Rules Governing § 2255 Proceedings. That command implicitly recognizes that assigning such a motion to a judge unfamiliar with the case would result in a considerable waste of time and effort.

§ 455(b)(1) Personal Knowledge

Section 455(b)(1) requires recusal where the Judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1).

Saccoccia's argument for recusal under this section is patently frivolous. It rests primarily on the assertion that this Court had several "ex parte communications relating to material facts . . . in dispute" and that both this Court and Judge Boyle necessarily would be witnesses at a § 2555 hearing regarding Hill's alleged conflict of interest. (Mem. Supp. Mot. Recusal at 11-12, 15.) However, it is clear from Saccoccia's own description of the alleged communications that they were not ex parte and did not deal

with any facts relevant to the § 2255 motion.

Saccoccia describes the communications as:

1. An August 24, 1992, letter from Michael Davitt, an Assistant United States Attorney involved in the Saccoccia prosecution, advising the Court that Hill had been arrested in Austria and was being detained there. (Id. at 5.)

2. An August 31, 1992, chambers conference in which Brian Adae, one of Saccoccia's trial counsel, participated and in which Adae was informed that he would be responsible for trying the case if Hill were unable to appear. (Id. at 5-6.)

3. A November 23, 1992, telephone call from the Court to Hill in which the Court instructed Hill to be present for a scheduled hearing on Adae's motion to withdraw. (Id. at 6.)

On its face, the Davitt letter (see attached Ex. A.) shows that a copy was sent to Adae and an affidavit filed by Adae does not dispute Adae's receipt of the letter.

The characterization of those communications as "ex parte" apparently rests on the bizarre proposition that a communication in which the defendant's attorney is involved is ex parte unless the defendant, himself, is present. Saccoccia's counsel cite no authority for such a novel definition. Nor do they mention the fact that the First Circuit has held that even an ex parte communication by a prosecutor does not disqualify a judge from hearing a case when the communication does not deal with

substantive matters. See Glynn v. Donnelly, 485 F.2d 692 (1st Cir. 1973) (communications by a prosecutor in the course of seeking a certificate to compel the attendance of a witness, pursuant to the Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, were not disqualifying even though defense counsel was not present).

In addition, Saccoccia fails to explain the alleged relationship between those communications and any disputed facts relevant to his § 2255 motion. On the contrary, it plainly appears that the communications dealt solely with Hill's availability and Adae's responsibility to take over if Hill was unable to appear.

In the absence of anything even approaching a showing that this Court has personal knowledge of any extra-judicial facts concerning Saccoccia's § 2255 motion, the unsupported assertion that this Court necessarily would be called as a witness at a hoped-for evidentiary hearing is insufficient to warrant recusal. Allowing a defendant to disqualify a judge assigned to his case simply by making such unfounded assertions would be tantamount to vesting the defendant or his counsel with the kind of veto power that was rejected in In re United States.

Conclusion

For all of the foregoing reasons, Stephen Saccoccia's motion

for recusal is denied.

IT IS SO ORDERED,

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Ernest C. Torres
United States District Judge

Date:_____, 1999

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